

bond under the provisions of R.S.C. Order 75, rule 16.

I am inclined to follow *The Alletta* (*supra*) in my approach to this question. I am of the view that where security in an action *in rem* is furnished by private agreement, such security can only be varied or substituted by mutual agreement of the parties or with the consent of the party affected by such variation or substitution. In the present case, the security by way of the Original Undertaking was given to the Plaintiffs, and not to the Court in the form of a bail bond as provided under our Rules of the High Court Order 70, rule 15 (which is *in pari materia* with the English R.S.C. Order 75, rule 16) and I fail to see how I have any jurisdiction to make the Order sought in this application.

As regards the second ground, I do not think that there is any merit in it. Suffice it to say that the question of hardship is wholly irrelevant, since the Plaintiffs are entitled to the security to be given as provided in the Original Undertaking, and it is not necessary for the Plaintiffs to establish liability against the Defendants so as to entitle them to such security; it is enough if the Plaintiffs merely show that they have a reasonably arguable case against the Defendants: *The Moschanthy* (*supra*).

For the reasons stated above, I would dismiss this application with costs to the Plaintiffs to be taxed.

Application dismissed.

Solicitors: Goh & Liew; Chan, Jugah, Wan Ullok & Co.

PUBLIC PROSECUTOR v. MOHAMED ISMAIL

[O. Cr. J. (Edgar Joseph Jr. J.) April 18, 1983]

[Penang – Criminal Trial No. 6 of 1982]

Criminal Law and Procedure – Charge of trafficking in dangerous drug – Amendment of law – Relevant date for purpose of conviction – Whether amendment constitutional – Federal Constitution, art. 7(1) – Dangerous Drugs (Amendment) Act, 1983 – Dangerous Drugs Act, 1952, s. 39(B)(1)

Constitutional Law – Retrospective amendment – Whether constitutional – Dangerous Drugs (Amendment) Act 1983 – Federal Constitution, art. 7(1).

In this case the accused was charged for an offence of trafficking in a dangerous drug, to wit, cannabis, in contravention of section 39B(1) of the Dangerous Drugs Act,

A 1952. The accused was found guilty. On the day when the accused was found guilty, section 39B(1) of the Dangerous Drugs Act, 1952 was amended to provide for the mandatory sentence of death upon conviction in all cases of trafficking in contravention of the section. Before the amendment, the Court had the option of sentencing the accused to death or imprisonment for life. The question which arose was what is the material date for determining sentence for such offences, is it the date of the offence or the date of conviction? The further question would arise if the material date was the date of conviction whether the amendment was constitutional so far as cases committed before the date of its coming into force was concerned.

C Held: (1) purely as a matter of construction and considered by itself, section 39B(1) of the Dangerous Drugs Act, 1952, in the form it now takes is open to only one reasonable construction, namely that it is the date of conviction which is the relevant date for purposes of sentencing;

D (2) the sub-section if it operates retrospectively, is clearly a law which comes within the striking range of Article 7(1) of the Federal Constitution and is therefore invalidated so far as cases where the offence was committed prior to the date of its coming into force are concerned;

(3) the Court therefore has a discretion in the matter of sentence as it is the subsection in the form it took prior to the amendment which applies.

E [Editorial note: the accused was sentenced to life imprisonment and ordered to be given six strokes on April 18, 1983. The grounds of judgment were reported at [1984] 1 M.L.J. 134]

Case referred to:

F (1) *Baker and Another v. Queen* [1975] 3 All E.R. 55, 57-58.

CRIMINAL TRIAL.

Nordin bin Haji Sulaiman (Deputy Public Prosecutor) for the Public Prosecutor.

G *R. Rajasingam* for the accused.

H Edgar Joseph Jr. J. (ruling on the effect of the amendment to section 39B(2) of the Dangerous Drugs Act, 1952 (Rev. 1980) by the Dangerous Drugs (Amendment) Act, 1983, which came into force on April 15, 1983): When on Friday last, that is to say, on April 15, 1983 after a somewhat lengthy trial, I found this accused guilty of trafficking in a dangerous drug, to wit, cannabis, in contravention of section 39B(1) of the *Dangerous Drugs Act*, 1952 (Rev. 1980) ("the Act")

I I invited the prosecution and the defence to address me on the question, whether as a matter of law, I had any discretion, to impose a sentence of life imprisonment with perhaps whipping as opposed to death. I raised this question because, until the day before the subsection which provided for penalties for the offence of trafficking in a

dangerous drug being s.39B(2) ("the subsection") clearly gave me such a discretion as it was in the following terms:—

"Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Ordinance and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping."

On the very next day, however, that is to say, on the day when I found the accused guilty, the subsection underwent a drastic amendment, namely, the words "or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping" were deleted by section 14 of the Dangerous Drugs (Amendment) Act, 1983, thus providing for the mandatory death sentence upon conviction in all cases of trafficking in contravention of s.39B(1) of the Act.

Upon these facts, the short point of law involved appeared to be, "what is the material date for determining sentence for such offences, is it the date of the offence or the date of the conviction?" The question is as simple as that; an interval of time, in the context of legal history, as fine as a hair, but, at first sight, as deep as a grave.

I now turn to consider the provisions of the sub-section in the form it now takes.

Clearly, the sub-section deals not with criminal liability but with the penalty which must be inflicted once such liability is established following trial or, alternatively, once the accused pleads guilty to the charge concerned. It is at that moment, that is, the moment of conviction, that the sub-section is activated.

I therefore take the view that purely as a matter of construction, and considered by itself, the sub-section in the form it now takes is open to only one reasonable construction, namely, that it is the date of conviction which is the relevant date for purposes of sentencing.

I am fortified in this view by a passage in the judgment of Lord Diplock, delivering the majority opinion in the Jamaican Privy Council case of *Baker and another v. The Queen*⁽¹⁾. In that case, the appellants were both 17½ at the date of offence, but over 18 at the date of conviction for murder. Sections 2 and 3 of the *Offences against the Person Law* provided that the death

A sentence is mandatory on conviction. But s.29(1) of the *Juveniles Law* of Jamaica provided that:

"Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure ..."

B Nevertheless, Parnell, J. took the view that the material date for purposes of sentencing was the date of conviction and sentenced the appellants to death. This view was shared by the majority of the Court of Appeal from whose decision the appellants appealed to the Judicial Committee of the Privy Council. Before their Lordships of the Board, it was common ground that the result of the appeal turned on the true construction of s.29(1) of the *Juveniles Law* and on this issue Lord Diplock said this:

D "Considered in isolation the words of each of these subsections, in their Lordships' view, are not capable as a matter of language of bearing the meaning that the date for ascertaining the age of a person for the purposes of either of the subsections is that of commission of the offence. The subsections are not dealing with criminal responsibility, the age of which is fixed at eight years of age by s.3 of the *Juveniles Law*. They are dealing only with the sentencing of persons whose criminal responsibility has been established at a trial. The person referred to in sub-s (1) and the 'juvenile' referred to in sub-s (2) is a person who has already been convicted of an offence and on whom sentence is about to be pronounced. Until that moment he does not fall within either subsection at all. So this must be the time at which he must be under the specified age in order to be entitled to the benefit of either subsection."

F That, however, is not the end of the matter because Article 7(1) of our Constitution provides as follows:

G "No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed."

H Now, it is clear beyond peradventure that the subsection in the form it now takes was enacted after the commission of the offence and, so far as cases such as this are concerned, plainly violates Article 7(1). Once again, I am fortified in this view by another passage in the judgment of Lord Diplock in *Baker's case* (*supra*) which reads as follows:

I "Their Lordships turn next to consider the effect on s 29 of the *Juveniles Law* of two provisions of the Constitution of Jamaica contained in ss.20(7) and 26(8). This is the only matter on which there is any conflict of authority.

Both provisions form part of Ch 3 'Fundamental Rights and Freedoms'. They are as follows. Section 20(7):

'No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence *at the time when it was committed*.'

Section 26(8):

'Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.'

Their Lordships will first express their own opinion as to the effect of these two provisions without recourse to the previous authorities.

Even if s.20(7) were considered in isolation, their Lordships do not consider that s.29 of the Juvenile Law would be inconsistent with its provisions. So far as they related to penalties for criminal offences, they are directed to invalidating laws *passed after an offence has been committed* which increase retrospectively the penalty that may be imposed for that offence."

[Emphasis supplied]

The subsection, assuming it operates retrospectively, is clearly a law which comes within the striking range of Article 7(1) and I would accordingly hold that it is invalidated so far as cases where the offence was committed prior to the date of its coming into force are concerned. It follows, therefore, that I have a discretion here in the matter of sentence, since the subsection in the form it took prior to the amendment is what applies.

I am now prepared to hear any further submissions as to how that discretion should be exercised regard being had to the circumstances of this case.

Order accordingly.

Solicitors: *R. Rajasingam & Co.*

A WONG KIM SWEE v. WONG CHEE MUN & ORS.

[O.C.J. (Abdul Razak J.) June 11, 1984]
[Kuala Lumpur — Civil Suit No. C910 of 1983]

B *Guarantee — Letter of Guarantee — Co-sureties agreed to honour guarantee — Discharge of debt by plaintiff — Claim against defendants for equal share of contribution — Contracts Act 1950, s.99.*

C The plaintiff together with the first, second, third and fourth defendants became co-sureties to the Bank of Tokyo for the debt of the Big Bear Supermarket Sdn. Bhd., the debtor for the sum of \$250,000/-. They held themselves liable to pay to the Bank if the debtor did not do so, under a letter of guarantee. Later, the Bank called upon the defendants as co-sureties to honour their guarantee. The plaintiff duly paid \$194,564.78 towards the discharge of the debt then outstanding by virtue of which the guarantee was discharged. He then called upon the defendants to contribute equally towards the amount disbursed by him, but they refused. He then sued each of the defendants for the sum of \$49,141.19 as their equal share of contribution and interest.

D The plaintiff had also charged his land for \$180,000/- and the wife of the first defendant had charged hers for \$70,000/- making a total of \$250,000/-.

E The plaintiff's claim against the first defendant was disallowed by the Senior Assistant Registrar. The plaintiff appealed against the said order.

F **Held**, allowing the appeal: section 99 of the Contracts Act, 1950 makes it quite clear, that if any of the co-sureties had paid the creditor towards the discharge of the debt and obtained a discharge (of which in this case there was no dispute), then the others were equally liable to contribute to the sum paid towards that discharge. If the payment had effected to discharge the first defendant's land as the additional security, it did not alter the defendant's liability to contribute since a discharge of the debt under the guarantee as provided by section 99 had been effected.

G CIVIL SUIT.

Philip M.C. Choong for the plaintiff.
S. C. Navarednam for the defendants.

H

Cur. Adv. Vult.

I **Abdul Razak J.:** The plaintiff together with the first, second, third and fourth defendants became co-sureties to the Bank of Tokyo for the debt of the Big Bear Supermarket Sdn. Bhd., the debtor for the sum of \$250,000/-. They held themselves liable to pay to the Bank if the debtor did not do so, under a letter of guarantee. Later, the Bank through their solicitors called upon the defendants as co-sureties to honour their guarantee. The plaintiff duly paid \$194,564.78 towards the discharge of the debt then outstanding by virtue